NO. 94-947 (2)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC. AND AMERISTAFF PERSONNEL CONTRACTORS, LTD.,
Respondents.

On Petition to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a paid union organizer who is committed by a union's "salting" resolution to work for the union in furtherance of its organizing drive against a nonunion employer and who works for, or seeks to work for, the targeted nonunion employer, is a bona fide "employee" of the targeted nonunion employer, within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. § 152(3)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

MISCELLANEOUS:

STATEMENT

This case involves paid union organizers operating under a "salting" resolution of a Local Union (hereinafter "the Union") affiliated with the International Brotherhood of Electrical Workers (hereinafter "the IBEW"). The Union's salting resolution applies to all the alleged discriminatees in this case. The purpose of the salting resolution is to create a very narrow and carefully defined exception to the general provisions of the Union's constitution and by-laws which prohibit members of the Union from working for nonunion employers.

The salting resolution states that the salted organizers shall be under the supervision of the Union's Business Manager and/or Assistant, and, ". . . shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification . . ." (App. 10a)[1]

The salted organizers are paid for their services to the Union. The Union pays fringe benefit contributions to the Union's fringe benefit funds on behalf of the salted

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[1] Cites will be as follows: App. __ references the appendix attached to the Petition for a Writ of Certiorari. 8th Cir. Jt. Ap. __ references the joint appendix filed with the Eighth Circuit Court of Appeals.

organizers for the hours they work for the targeted nonunion employer. (App. 14a, 16a) And, at a minimum, they are paid wages by the Union in an amount equal to the difference between the union scale and the wage rate paid by the targeted nonunion employer. (App. 9a) However, Malcolm Hansen received almost $1,100 from the Union for his organizational efforts as compared to $725 for his work for Town & Country Electric, Inc.[2] (hereinafter "TCE"), the targeted nonunion employer. (App. 9a) Presumably, the other salted organizers would have received similar pay from the Union if they had been hired by TCE. In any event, it is apparent from the amount of compensation Hansen received from the Union, that his primary purpose in entering TCE's workforce was not to receive the pay provided by the contractor.

The National Labor Relations Board (hereinafter "NLRB") held that the obligations imposed by the Union's salting resolution on the salted organizers, and the compensation they were to receive from the Union for the services they performed for the Union during the time they

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[2] Pursuant to Rule 29.1, TCE advises the Court that there are no parent or subsidiary companies.

were ostensibly working for TCE, did not prevent the salted paid organizers from entering into a bona fide employment relationship with TCE, the targeted nonunion employer. The Eighth Circuit Court of Appeals disagreed.

In this case, TCE obtained maintenance work at the existing Boise Cascade mill in International Falls, Minnesota in September of 1989. (App. 2a) TCE learned that it needed one Minnesota licensed electrician for every two electricians working on that job who weren't licensed in Minnesota. At that time, none of TCE's electricians were licensed in Minnesota. (App. 2a)

To help it recruit Minnesota-licensed electricians, TCE retained Ameristaff, a temporary employment agency, who advertised for licensed electricians in a Minneapolis newspaper. (App. 2a-3a) Interviews were scheduled with Minnesota licensed electricians who had called Ameristaff in response to the ad, at the Embassy Suites Hotel in Minneapolis, Minnesota. (App. 2a-3a)

The interviewers' chartered flight from Appleton, Wisconsin, the location of TCE's home office, was delayed for approximately two hours due to bad weather. (App. 3a, 52a) Because the interviewers did not want to miss TCE's scheduled, weekly manpower meeting that afternoon at its

home office, they were anxious to complete the interviews and return to Appleton. (App. 3a)

The interviewers offered a job to the second person they interviewed. (App. 3a) After the second interview, Steve Buelow, from Ameristaff, reported that the remaining people who had filled out applications in the adjoining room, were not scheduled for interviews. Buelow also observed that the intruders appeared to be from a union. (App. 3a) Ron Sager, TCE's manager of human resources, decided, because of his desire to get back to the manpower meeting in Appleton, to only interview those applicants with appointments. (App. 3a)

Upon being told of Sager's decision, the intruders became quite unruly, and one of them, Malcolm Hansen, claimed to have an appointment. (App. 3a) Sager tried to quiet the crowd and promised to interview Hansen if he had indeed scheduled an interview. (App. 3a, 19a) Hansen was interviewed after it was confirmed he had scheduled one, and he was hired even though he volunteered information that he was affiliated with the Union.[3] (App. 4a)

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[3] In its Petition, the NLRB presented several findings of fact apparently intended to show that TCE was discriminatorily motivated. (continued...)

The ALJ, with the NLRB's approval, found that TCE had discriminatorily refused to consider the applications of the intruders at the Embassy Suites interviews, based primarily on the ALJ's presumption of TCE's discriminatory motivation. However, the ALJ found that TCE did not act unlawfully when it failed to consider the intruders' applications after Ameristaff was removed from the job a few days later when it was discovered that Minnesota law would not permit TCE to count Ameristaff employees towards the licensed electrician ratio requirements, because if TCE had hired any of those applicants, whose qualities were unknown,

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[3](...continued)
The NLRB also asserted, in footnote 7, page 9 of its Petition, that TCE had not challenged these findings of unlawful conduct. Contrary to the NLRB's assertion, the Employer has vigorously opposed all the findings of discriminatory motive and the related findings of violations of 29 U.S.C. § 158(a)(1), on the ground that those findings are the product of the Administrative Law Judge's (hereinafter "ALJ") improper presumption that all nonunion employers will discriminate against people affiliated with a union which might attempt to unionize them. The ALJ made that presumption irrebuttable by using it to resolve credibility issues against TCE even though the ALJ had substantially discredited Hanson's testimony regarding the Embassy Suites interviews. See, e.g., App. 108a-109a, fn. 72; App. 77a, fn. 34; App. 65a. It is and has been TCE's position that, absent the ALJ's presumption of discriminatory motive, the record establishes that no discriminatory or coercive statements were made by any agent of TCE and that no agent of TCE engaged in any unlawful conduct. The Eighth Circuit found it unnecessary to decide that issue. App. 11a.

it would have had to pay Ameristaff a substantial fee. (App. 56a-57a) And, the ALJ found that TCE had not unlawfully interrogated or made unlawful statements to Malcolm Hansen or others at the Embassy Suites interview session, notwithstanding Hansen's claims that such statements were made. (App. 72a-73a, 75a-78a) The ALJ also found that TCE had not unlawfully interrogated or discriminated against Charles Evans or Roger Kolling. (App. 124a, 127a)

At the Boise Cascade mill in International Falls, Hansen spent much of his working time talking to TCE employees about the advantages of unionization, despite being warned to refrain from disrupting the work of other employees during working time. (App. 4a, 110a, fn. 73) As a result, a number of TCE's employees complained to their supervisor that Hansen was interfering with their work. (App. 49)

TCE contended that, when Hansen did work, he abused TCE's tools and equipment and performed poor quality work. The ALJ, with NLRB approval, largely discredited the testimony of four TCE employees regarding Hansen's poor work performance essentially based on Hansen's denial, even though the ALJ had discredited

Hansen elsewhere and had caught him lying in his explanation of his work performance.[4] (App. 110a-121a)

After Hansen had been on the job for three days, Ameristaff learned that TCE could not use Ameristaff employees to satisfy the Minnesota licensed electrician ratio requirements, and, therefore, let Hansen go. (App. 107a-108a)

The ALJ, with NLRB approval, found that TCE's failure to put Hansen on its payroll was discriminatorily motivated. (App. 121a, 14a) The ALJ and the NLRB further found that representatives of TCE had made several unlawful statements at the International Falls project, again,

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[4] The ALJ frequently found the General Counsel's principal witnesses, Hansen and Priem, unreliable. (App. 54a, fn. 15, 72a-74a, 86a, fn. 44, 109a, fn. 73) Indeed, the ALJ caught Hansen lying when Hansen supported his denial that he had ruined TCE's drill bits by claiming that he always carried a unibit with him. Hansen claimed that he had the unibit drill bit in his pocket all day during the hearing, but the ALJ's inspection revealed the metal bit was still cold, apparently from having recently been brought into the hearing room after recently being outside in the December cold characteristic of Minneapolis. 8th Cir. Jt. Ap. 339-340. Essentially the only basis for the ALJ's partial crediting of Hansen was the ALJ's presumption of TCE's unlawful motivation. The ALJ implicitly acknowledged that fact when he justified his findings by stating that the testimony of TCE's witnesses didn't "comport with economic reality" and that the General Counsel's witnesses' testimony was "more plausible." (App. 65a, 108a-109a, fn. 72)

based primarily on the ALJ's presumption of TCE's discriminatory motivation. (App. 13a-14a, 109a-110a)

The Eighth Circuit Court of Appeals decided that none of the alleged discriminatees were bona fide employees of TCE within the meaning of the National Labor Relations Act (hereinafter "NLRA"), as amended. (App. 9a) Therefore, no violation of the NLRA occurred. The Eighth Circuit found it unnecessary to decide whether the NLRB improperly approved the ALJ's use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union, or whether the Board failed to follow the precedent that permits employers to prohibit solicitation during work time. (App. 10a-11a) Accordingly, the Eighth Circuit denied enforcement of the NLRB's order. (App. 11a)

REASONS FOR DENYING THE PETITION

The Petition herein should be denied because the Eighth Circuit's decision is based on the specific facts of this case relating to the Union's salting resolution, and there is no other court of appeals decision based on a local union's salting resolution. Therefore, there is no conflict in the circuits regarding whether individuals governed by the salting resolution herein are bona fide employees of the targeted nonunion employer. In addition, the Eighth Circuit's decision is correct.

This Case Is Unique

The Eighth Circuit said that the Union's salting resolution was "controlling" on the issue of whether the alleged discriminatees were bona fide employees within the meaning of the NLRA, as amended. The NLRB acknowledges, in footnote 13, page 27 of its Petition for a Writ of Certiorari, that no other court of appeals has considered the effect of a salting resolution on that issue.

The NLRB seeks to avoid this lack of a conflict in the circuits by speculating that the Eighth Circuit would have reached the same result absent the salting resolution, based on that Court's endorsement of the Fourth Circuit Court of

Appeals' reasoning in H.B. Zachry Co. v. N.L.R.B., 886 F.2d 70 (4th Cir. 1989).

Since the Eighth Circuit disposed of the issue herein on the basis of the salting resolution, its comments regarding the Zachry case were essentially dicta. This is confirmed by the Eighth Circuit's statement that all twelve of the alleged discriminatees, including the two full-time paid union officials, were members of the Union. (App. 3a) Indeed, the Eighth Circuit specifically included the two full-time paid union officials in its holding that the salting resolution by which all the alleged discriminatees were bound was inconsistent with an employment relationship with the targeted nonunion employer. (App. 9a) Therefore, it was unnecessary for the Eighth Circuit, and it is unnecessary for this Court, to consider the more general holding in the Zachry case, *supra*.

The NLRB also claims, without any support in the record, that union constitutions or by-laws, in general, often contain provisions which permit members to work for nonunion employers with permission of the union.[5]

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[5] It is common for the constitutions and by-laws of construction trades unions to prohibit members from working for employers who do not have a labor agreement with that trade union.

Such general permission provisions, even to the extent they may exist, are substantially different from the provisions of the salting resolution herein. The general permission provisions may apply to a wide variety of situations, e.g., when work is not available through the union, when the member is learning another trade, or is temporarily working in another trade, etc. The general permission provisions do not contain an affirmative obligation to work for the union, under the control of the business manager, in furtherance of the union's organizing drive while on the targeted nonunion employer's payroll, nor do they contain any commitment on the part of the union to compensate the member for the services provided to the union by the member. Further, the general permission provisions do not contain an express requirement that the member perform organizing duties promptly and diligently, nor do they contain the express right of the business manager to force the member to leave the nonunion employer as soon as the member's organizing service to the union is complete. The difference between the salting resolution and the general permission provision is confirmed by the fact that the Union herein considered it necessary to adopt the salting resolution before asking members to work as salted union organizers.

Therefore, the Eighth Circuit's decision herein does not apply to members of a union who are not covered by a salting resolution and are not similarly controlled by the Union.

The NLRB represents, at page 29 of its Petition, that there are other cases involving the more general Zachry holding being processed through the NLRB and the courts. It would appear advisable for the Court to wait for a more appropriate vehicle than the instant case for directly addressing the split in the circuits on the Zachry holding.

The NLRB relies heavily on the decision of the Court of Appeals for the D. C. Circuit in Willmar Electric, 968 F.2d 1327 (D.C. Cir. 1992) cert. denied, 113 S. Ct. 1252 (1993). However, the court in that case reserved the issue herein. It stated it was ". . . leaving to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (nonunion) employer can reject or dismiss the union employee on that ground." The Eighth Circuit decided that the salting resolution in the instant case was an employment tie that established a sufficient risk of disloyalty that an employer may reject an employee on that ground. The Eighth Circuit's decision herein on the issue of the effect of the salting issue on the status of the salted organizers is not inconsistent with the D. C. Circuit Court of Appeals' decision in the Willmar Electric case.[6]

The Eighth Circuit's Decision Is Correct

As more fully set forth in the Eighth Circuit's decision (App. 5a-9a), the NLRA, as amended, only protects employees as defined in that Act. Lechmere, Inc. v. N.L.R.B., 502 U.S. ___, 112 S. Ct. 841, 845, 117 L. Ed. 2d 79 (1992). And, as acknowledged by the NLRB on page 13 of its Petition, in interpreting the term "employee," as used in the NLRA, the NLRB and the courts are to be guided by the common law.[7] The common law provides

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[6] A person is only entitled to the protections of the NLRA if that person is an employee. The D. C. Circuit in Willmar Electric, *supra*, failed to recognize that threshold issue. Instead, that court assumed that the paid union organizer was an employee protected by the NLRA and then examined the record to determine if he had done something outside the scope of protected activity which caused him to lose his status as an employee, thereby improperly shielding the conflict created by his paramount duty to the union that, under the Law of Agency, disqualified him from being an employee of the targeted nonunion employer.

[7] The NLRB does not assert that Congress has said that paid union organizers planted in a targeted nonunion employer's workforce pursuant to a salting resolution are "employees" of the nonunion employer within the meaning of the NLRA, as amended. However, the NLRB does assert that Congress has said, in § 302(c)(1) of the Labor Management Relations Act of 1947 (hereinafter "LMRA") (29 U.S.C. § 186(c)(1)), (continued...)

that a person may not be the servant of two masters if the service to one involves an abandonment of or a conflict with the service to the other. Restatement (Second) of Agency, § 226 (1957).

The Law of Agency requires that the capacity of the person to be an agent be viewed from the perspective of the principal, in this case, TCE, the employer. The issue is whether a person seeking employment can enter into a bona

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[7](...continued)
that an individual is not necessarily disqualified from working for both a union and an employer. That very general provision contemplates union stewards and officers who work for a unionized employer. They all work towards the mutual implementation of the collective bargaining agreement. That does not create the type of conflict of interest that exists under a salting resolution between a union and the targeted nonunion employer.

Indeed, even the NLRB recognizes that a conflict of interest of significant magnitude to disqualify a union agent from being an "employee," may exist in certain situations. In Sunland Construction Co., Inc., 309 N.L.R.B. 1224, 1230-1231 (1992), a companion case to the instant case, the NLRB held that, in a strike situation, the interests of the salted organizer are "inherently and unmistakably inconsistent with employment [for the nonunion employer] behind a picket line" and that a nonunion employer does not violate the NLRA by refusing to hire an agent of the striking union. This shows that the NLRB does not consider Section 302 to represent blanket approval by Congress of all situations in which an individual is employed by both a union and an employer. In fact, Section 302 of the LMRA merely recognizes that there may be situations, e.g., in a collective bargaining setting, where an individual could be a bona fide employee, as defined in the common law, of both a union and an employer. Therefore, Section 302 of the LMRA is not inconsistent with the Eighth Circuit's decision herein.

fide employment relationship in which that person is free to conform to the employer's requirements. If the person's prior relationship restricts the person's freedom to conform to the second principal's requirements, then that prior relationship, in effect, requires that person to abandon his or her service to the second principal. That person's response to the second principal's directions is dictated by that person's conflicting obligation and paramount responsibility to the first principal which, in this case, is the Union. Under those circumstances, that person cannot enter into a bona fide agency relationship with the second principal. Thus, under the Law of Agency, the second principal isn't required to take the risk that the person who is contractually bound to a master with conflicting interests will fail to diligently perform that person's duties as an agent of the second principal. Such a conflict of interest exists in this case.

The NLRA contemplates that an employer and a union have equal rights to compete for the confidence and the votes of the employer's employees. The NLRA recognizes that the employer and the union have conflicting interests and it provides rules within which those adversarial

interests may legitimately compete for the votes of the employees.

As acknowledged by Member Oviatt in his concurring opinion in Sunland Construction Co., Inc., 309 N.L.R.B. 1224 (1992), which was consolidated with the instant case for oral argument before the NLRB, ". . . the relationship between a nonunion employer and a union seeking to organize its employees is usually adversarial, and sometimes quite heated." Id., 1231-1232. See also, Labor Relations Law in the Private Sector, F. Bartosic and R. Hartley, pp. 60-61. "In administering [the NLRA], the Board and the courts seek to accommodate the legitimate, but competing, and at times conflicting, interests of the employer, the employees, the union, and the public at large . . . The clash of competing and conflicting interests is perhaps most apparent in the context of union organizational campaigns . . ."

Those conflicting interests give salted paid union organizers an irreconcilable conflict of interest. A paid union organizer who is successful in getting on the targeted nonunion contractor's payroll has ample opportunity to serve the interests of his primary master, the union, by acting adversely to the interests of the targeted nonunion employer

while masquerading as an employee of that employer. The salted organizer can cast the nonunion contractor in a bad light in the eyes of the employees of the contractor by the manner in which the salted organizer performs its work, or doesn't perform its work, as well as by what the salted organizer says and does. That is in direct conflict with all employees' obligation to an employer to apply the employee's best efforts to perform the work assigned to the employee while working for that employer. Yet, it would be virtually impossible for the nonunion contractor to prevent the salted organizer's deleterious conduct through the disciplinary procedure, because it would be very difficult for the contractor to know or to prove that the salted organizer had not acted in good faith. And, the protections of Section 7 of the NLRA, which are intended by Congress only to be granted to bona fide employees, could be interpreted to prevent the contractor from taking any action in response to a substantial amount of the salted organizer's anti-contractor activity, since the protections afforded by Section 7 are very broad in order to protect bona fide employee activity. Because the salted organizer can conceal its conflict of interest, both the employees and the employer may be misled to believe that the organizer is acting independently, when,

in fact, the organizer is merely doing what the union has paid it to do. It is the corruptness of this situation which is one of the reasons the law of agency provides that a paid organizer cannot, in good faith, become an employee of a targeted nonunion employer.

Indeed, compare the obverse of salting, i.e., employer placement of an employee in a union position to collect information and otherwise further the interests of the employer. That practice has been considered spying and industrial espionage. It caused a public outcry and its abolition was considered crucial by Congress. See, From The Wagner Act To Taft-Hartley: A Study of National Labor Policy and Labor Relations, H. Millis and Emily Clark Brown, at page 101. See also, Fruehauf Trailer Company, 1 N.L.R.B. 68, 73 (1935), in which the NLRB held that an employer violated the NLRA by having its employee apply for and obtain employment with the union that represented its employees.

The salting resolution herein requires the paid organizers planted on the payroll of the targeted nonunion employer to promptly and diligently perform the paid organizer's organizing duties. There is no suggestion of deference to tasks assigned by the targeted nonunion

employer. On the contrary, the member's organizing duties are paramount. Those duties take precedence over everything else. And, as soon as those organizing duties are completed, the salted paid organizer is pulled from the workforce of the targeted employer. It is apparent that the only reason the salted paid organizer is permitted to be on the targeted nonunion employer's payroll is to work for the union in furtherance of the union's interests in organizing the employer's employees. As aptly illustrated by Hansen's conduct at the Boise Cascade jobsite, a salted paid organizer cannot diligently and promptly perform organizing duties for the union and simultaneously perform the electrical work assigned by the nonunion employer in a diligent and prompt manner. Therefore, a paid union organizer governed by the salting resolution cannot become a bona fide employee of the targeted nonunion employer.

Any doubts regarding the conflicting interests of employers and unions in organizing drives are removed when current union organizing tactics are examined. See, e.g., the salting case discussed in the N.L.R.B. General Counsel's Report dated November 28, 1994 in which the "salts" engaged in a variety of protected disruptive activities in addition to what were considered in protected disruptive

activities, including slowdowns, intermittent strikes and sabotage which, together, caused the targeted employer to lose over $100,000 and go out of business; and, "'Salting' the Contractors' Labor Force: Construction Unions Organizing With NLRB Assistance", by Professor Herbert R. Northrup in the Journal of Labor Research, Vol. XIV, Number 4, pp. 469-492 (Fall 1993), in which Professor Northrup observes at page 479, "The blunt memoranda from Michael Lucas, the IBEW salting chief, also clearly demonstrate that salters are often not interested in permanent employment. Rather, they frequently are devoted to harassment, destruction of productivity, or even in the case of a very successful open-shop builder like BE&K, elimination of the company itself unless it changes its ways and agrees to unionization." In other words, the salted organizer's objective is to use ostensibly protected and unprotected activity to inflict financial pain on the nonunion employer to force that employer to sign a union contract, without regard to the wishes of the employer's employees, or be forced out of business.

In the instant case, the Union sought to plant union organizers on the payroll of TCE, the targeted nonunion employer. The one salt who was effectively planted on

TCE's crew, Malcolm Hansen, spent much of his working time as a union organizer soliciting nonunion employees to join the Union instead of diligently working as an electrician as directed by TCE's foreman, notwithstanding the protests of those nonunion employees regarding Hansen's disruption of their work.

Contrary to the NLRB's assertion on page 7 of its Petition, Hansen was not financially dependent on the contractor for whom he ostensibly worked. The compensation Hansen received from the Union far exceeded that which he received from the contractor.

Hansen was not unlike an employee of a manufacturer competing for a billion dollar contract, who has been assigned to seek employment with the manufacturer's competitor to do whatever he or she is directed to do to assist the manufacturer to get that order away from its competitor. Likewise, Hansen's job, and the job of the other salts, if they were hired, was to do whatever they were directed to do to assist the Union in unionizing TCE without regard to the desires of TCE's employees.

The conflict of interest of the salted paid organizer is inherent in the paid organizer's relationship with the Union. That is why the law of agency provides that people with such

a conflict of interest cannot enter into a bona fide employment relationship with another employer with whom those interests conflict.

The NLRB, in an attempt to justify its failure to follow the common law definition of an employee, asserts that TCE can protect its legitimate interests by challenging the vote of the salted organizer and through the disciplinary procedure. In effect, the NLRB's position is analogous to the assertion that because a lawyer's clients can sue for malpractice, there shouldn't be any conflict of interest rules for lawyers. One of the reasons conflict of interest rules exist is because remedies after-the-fact are ineffective. Likewise, the employer remedies referred to by the NLRB are ineffective.

The NLRB has held that an employer can challenge the vote of a salted organizer in an NLRB certification election. However, that right is meaningless if the salt keeps the salt's relationship to the union secret. Member Kennedy, dissenting in the Oak Apparel case, noted that union organizers are not always candid about their relationship to the union. 218 N.L.R.B. 701, 702 (1975).

The NLRB has also held that an employer may restrict a salted organizer's work-disrupting organizational

activity. However, as TCE found in the instant case, in practice, the NLRB does not recognize an employer's right to enforce a no solicitation rule against a salted organizer.[8]

In fact, the NLRB has acknowledged that, in at least one situation, a union agent's conflict of interest is sufficient to disqualify the union agent from becoming an employee of an employer. In Sunland, *supra*, the NLRB held that the conflict of interest of an agent of a striking union disqualified him from being considered an employee of a struck employer. 309 N.L.R.B. at 1230-1231. Yet, the interests of that nonunion employer were only marginally different before the strike. As previously noted, the same economic battle that is fought on the picket line is carried on in the workplace. See, "'Salting' the Contractor's Labor Force," *supra*, and Report of the General Counsel dated November 28, 1994, *supra*. The salting resolution would be invoked in essentially the same manner in both situations. The NLRB's distinction between unions that are striking, and unions using similar strategies in the workplace, as described by Professor Northrup and in the NLRB General Counsel's Report

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[8] The Eighth Circuit found it unnecessary to rule on TCE's position that the NLRB improperly failed to uphold TCE's enforcement of its no solicitation rule. App. 10a-11a.

referred to hereinabove, to coerce a targeted nonunion employer into signing a labor contract without regard to the wishes of the employees of the nonunion employer, is not valid. Similarly, the NLRB's holding in the instant case that the Union's salting resolution doesn't prevent the paid union organizers from becoming bona fide employees of the targeted nonunion employer, is not valid.

CONCLUSION

The Eighth Circuit was careful to limit the scope of its decision. The Court made it clear that its decision did not apply to an applicant who, without being contractually obligated to do the union's bidding, was loyal to both the employer and the union. Such applicants would be employees within the meaning of the NLRA under the Eighth Circuit's decision.

However, under the union salting resolution in this case, a person bound by that resolution was not free to enter into a bona fide employment relationship with a nonunion contractor who was a target of the salting activity. Therefore, that person could not be considered an "employee" of that targeted nonunion contractor within the meaning of the NLRA.

The Eighth Circuit's decision is based on the salting resolution, which disposes of all the issues in the case. No other circuit has ruled on the effect of a salting resolution. Therefore, there is no conflict between the circuits on the basic issue in this case. There are other cases that are more directly based on the holding in the Zachry case and which would be a more appropriate vehicle for resolving the issue decided in the Zachry case, regarding which the circuits are split.

Therefore, we respectfully request that this Court deny the NLRB's Petition for a Writ of Certiorari herein.

Respectfully submitted.

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Douglas E. Witte

December, 1994